

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT ON POST E.C.S.

Docket No. C99-1

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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**UNITED STATES POSTAL SERVICE REQUEST FOR CERTIFICATION
OF PRESIDING OFFICER'S RULING NO. C99-1/3
(July 14, 1999)**

Pursuant to Rule 32 of the Rules of Practice and Procedure, the Postal Service requests that the Presiding Officer certify to the Commission an appeal of Presiding Officer's Ruling No. C99-1/3 granting in part the United States Postal Service Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (filed June 8, 1999).

I. INTRODUCTION

On June 8, 1999, the Postal Service filed a Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (hereinafter "Motion"). In that Motion, the Postal Service requested that the Presiding Officer reconsider P.O. Ruling No. C99-1/2 and issue a ruling (1) stating that the scope of the proceeding would be confined to the question of whether Post E.C.S. is a "postal" service, (2) identifying the subsequent steps and stages in this proceeding, and (3) identifying the manner of disposition of this proceeding. UPS, the Office of the Consumer Advocate (OCA), and the Coalition Against Unfair USPS Competition (CAUUC) filed responses to the Postal Service's Motion. On July 7, 1999, the Presiding Officer issued P.O. Ruling No. C99-1/3 granting in part the Postal Service's Motion for Partial Reconsideration. The ruling addresses three issues. First, the Presiding Officer directed that the procedural schedule in this docket will be phased, with the initial phase focused on the issue of whether Post

E.C.S. is a postal service. The Presiding Officer accordingly ruled that discovery and other fact finding in the "initial phase" would be "limited to the 'postal' issue at this stage of the proceeding." P.O. Ruling No. C99-1/3 at 3. Second, the Presiding Officer issued a procedural schedule for the first phase of the proceeding, but did not specify what the subject matter or purpose of subsequent phases of the proceeding would entail. Third, the Presiding Officer declined to issue a ruling addressing what form the decision resolving the first phase will take. It is the two latter issues on which the Postal Service requests certification of an appeal. Specifically, the Postal Service requests that the Commission identify what issues will be addressed in the subsequent phases of this proceeding. In addition, the Postal Service requests that the Commission identify the form which a Commission resolution of the first phase of the proceeding will take.

II. THE CRITERIA FOR CERTIFICATION ARE SATISFIED.

Rule 32 of the Commission's Rules of Practice and Procedure provides, in pertinent part, that a request for certification of an appeal is appropriate when the ruling for which an appeal is sought "involves an important question of law or policy concerning which there is substantial ground for difference of opinion" and "subsequent review will be an inadequate remedy." These criteria are satisfied here. First, the issue in controversy here involves an important question of law on which there is a substantial ground for difference of opinion. As stated in Postal Service's Motion, the Docket No. C96-1 provides ample proof of the importance of, and diversity of views expressed on, the legal matters at issue here. In that proceeding, the Governors and the Commission expressed very different opinions on the interpretation of the Postal Reorganization

Act's provisions governing the resolution of complaints filed under 39 U.S.C. § 3662.¹ Both the Commission and the Governors published decisions in the *Federal Register* expressing their interpretation of the Postal Reorganization Act and how, if at all, a complaint challenging the nonpostal character of a service fits within the provisions of section 3662. This proceeding therefore provides the Commission with its first opportunity to state its conclusions on the interpretation of the Act with the benefit of the Governors' Decision in Docket No. C96-1.

In addition, subsequent review will not provide an adequate remedy. Denial of the instant request would be highly prejudicial to the Postal Service's legal position in the event that the Commission concludes that Post E.C.S. is a postal service. In Docket No. C96-1, upon issuance of its Declaratory Order, the Commission held further proceedings in abeyance pending (1) the filing of a request for a rate and classification for Pack & Send or (2) the filing of a notice by the Postal Service "to the effect that Pack & Send service has been discontinued." Order No. 1145 at 25. Because the form of decision was both unprecedented and unconventional, the Commission's Declaratory Order in Docket No. C96-1 effectively denied the Postal Service the opportunity to prepare evidence in support of a classification and rate for Pack & Send service expeditiously, in a manner that would minimize the disruption to the Postal Service and its customers. Thus, in order to give the Postal Service a fair expectation of how it

¹ See PRC Order No. 1145 (61 Fed. Reg. 67,356); PRC Order No. 1156; Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Complaint of the Coalition Against Unfair USPS Competition, Docket No. C96-1 (April 8, 1997), 62 Fed. Reg. 23813 (May 1, 1997) (hereinafter "Gov. Dec.").

should plan for the subsequent stages of this proceeding, the Postal Service submits that resolution of this matter by the Commission is imperative at this juncture.

The Postal Service also offers a separate, independent reason in support of certification. The Ruling cites section 23(a)(7) of the Commission's Rules of Practice and Procedure as a basis for declining to rule on the "form of decision" issue. Section 23(a)(7) provides that presiding officers are not to rule on "motions which involve a final determination of the proceeding." P.O. Ruling No. C99-1/3 at 6. This provides further justification in support of certification. The Postal Service and other participants should not be left to guess what the subsequent phases of the proceeding will entail, or the form by which the first phase will be resolved, simply because the Presiding Officer interprets section 23(a)(7) to deny him the ability to rule on the Postal Service's Motion. Rather, it is appropriate for the Presiding Officer to certify these issues to the Commission, since they are unquestionably within the Commission's authority.

III. RESOLUTION OF THE FIRST PHASE MUST BE IN THE FORM OF A RECOMMENDED DECISION.

As the Governors have firmly expressed, the Commission's use of any vehicle other than a recommended decision to resolve the complaints challenging the nonpostal status of services would be "fundamentally inconsistent with the statutory scheme governing the Postal Service, and the respective roles of the Commission and the Governors under the Postal Reorganization Act." Gov. Dec., 62 Fed. Reg. 23,813. Section 3662 unequivocally provides that when the Commission finds a complaint to be justified, it "shall" issue a recommended decision to the Governors. Section 3662 states, without reservation, that "[i]f the Commission . . . determines the complaint to be

justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628" This requirement is echoed by the Commission's own rules of practice and procedure, which state:

If the Commission determines, after the completion of proceedings which provide an opportunity for hearing, that a complaint is justified in whole or in part, the Commission shall issue a recommended decision to the Postal Service if the complaint involves a matter of rate and fees or mail classification and shall render a public report if the complaint involves other matters.

39 C.F.R. § 3001.87. In short, the plain language of the Act, as well as the Commission's Rules of Practice, provide unambiguous and clear direction that the Commission must resolve complaints with a recommended decision.

The Ruling alludes to the possibility that the Commission could bifurcate the proceeding in a manner that would allow it to issue a decision on the postal/nonpostal question in a form other than a recommended decision, and introduce other issues in subsequent phases. See P.O. Ruling No. C99-1/3 at 7 ("as this case will proceed in phases, the Commission may or may not find it necessary to take action on items that are not within the areas of responsibility of the Governors"). In this regard, it would appear that a declaratory order finding that Post E.C.S. is a "postal" service would, in effect, constitute a final disposition from the Commission on the merits of the postal/nonpostal question.² As the Postal Service and the Governors explained in

² By analogy, this approach would also be inconsistent with judicially established principles regarding ripeness and finality of administrative decisions in the context of the Administrative Procedure Act and judicial review of agency decisions. See, e.g., *FTC v.*

Docket No. C96-1, this critical issue should not be resolved in a way that deprives the Governors of an effective opportunity to exercise their authority under section 3625, particularly within the context of prohibitions in section 3628 against judicial review of the Commission's and Governors' determinations under the Act. The Commission's disposition of the postal/nonpostal status of Post E.C.S., particularly without the opportunity for timely and effective review by the Governors, could have serious, irreversible, and legally perilous consequences for the Postal Service. Without the opportunity for further review, the Postal Service would be subjected to further costly and time-consuming proceedings, including invasive discovery, with no opportunity to seek relief until the Commission ultimately concludes the subsequent phases. In

Standard Oil Co., 449 U.S. 232 (1980); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970); see also; *International Tel. & Tel. Corp., Communications Equipment & Systems Div. v. International Brotherhood of Electrical Workers*, 419 U.S. 428 (1975) (A final disposition is one which has "some determinate consequences" for the parties"); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Frozen Food Express v. United States*, 351 U.S. 40 (1956) (ICC declaratory order that specified commodities not within a statutory exemption was final action subject to judicial review). The Court in *Standard Oil* identified the indicia of finality of agency action. These are that the administrative action challenged should be a "'definitive' statement[]" of an agency's position; the action should have a "'direct and immediate ... effect on the day-to-day business' of the complaining parties"; the action should have "'the status of law"; "'immediate compliance with the[] terms [should be] expected"; and the question should be a legal one "'fit for judicial resolution.'" 449 U.S. at 239-40 (quoting 387 U.S. at 151-54). Similarly, in *Rederiaktiebolaget Transatlantic*, the Court explained that:

The relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.

Rederiaktiebolaget Transatlantic, 400 U.S. at 71 (citations omitted).

addition, the federal courts have adjudicated claims regarding the Postal Service's authority to offer postal services prior to receiving a recommended decision from the Commission, *see, e.g., United Parcel Service v. United States Postal Service*, 455 F. Supp. 857, 865, 870 (E.D. Pa. 1978), *aff'd*, 604 F.2d 1370, 1379 (3rd Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), and the Commission's disposition of the postal/nonpostal issue could very well place the Postal Service in a defensive posture in a suit for equitable relief.³ As such, the Commission's disposition of the postal/nonpostal question must be in a form that facilitates subsequent review by the Governors.

Finally, refusing to issue a recommended decision in this context would undermine the delicate balance that Congress crafted in the Act. The Commission and the Governors are 'partners' in the ratemaking process. *Mail Order Ass'n v. United States Postal Service*, 986 F.2d 509, 524 (D.C. Cir. 1993);⁴ *Governors of United States Postal Service v. United States Postal Rate Commission*, 654 F.2d 108, 114-15 (D.C. Cir. 1981). For the Commission to issue dispositive declaratory orders addressing the merits of challenges to the nonpostal status of services deprives the Governors of the exercise of their statutory options under 39 U.S.C. § 3625, as well as their authority under 39 U.S.C. § 202 to exercise the powers of the Postal Service, which include, *inter alia*, the exclusive powers to provide nonpostal services and initiate rate requests. 39 U.S.C. §§ 401, 404, 3621, 3622. Simply put, the statutory scheme neither

³ The Postal Service does not intend this pleading to waive any right it may have to assert defenses in such a proceeding.

⁴ *remanded, in part, review denied, in part, Mail Order Ass'n v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993), *amended, reh'g denied, Mail Order Ass'n v. United States Postal Service*, 1993 U.S. App. LEXIS 24994 (D.C. Cir. Sept. 22, 1993).

contemplates nor authorizes the Commission to act unilaterally in contravention of this partnership.

CONCLUSION

WHEREFORE, the Postal Service respectfully requests that the Commission describe with particularity the purpose and subject matter of subsequent phases of this proceeding and the form which resolution of the first phase of this proceeding will take.

The undersigned counsel has sent a copy of this document to counsel for complainant via facsimile¹ transmission.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

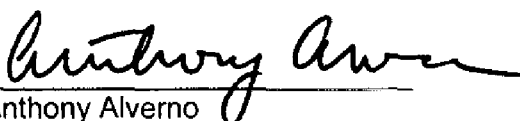
Daniel J. Foucheaux, Jr.
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Anthony Alverno

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


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July 14, 1999